Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN A. AND MARY B. SCHMITZ

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWARD H. AND MARIANNE KELLER

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MICHAEL L. AND BILLIE M. RICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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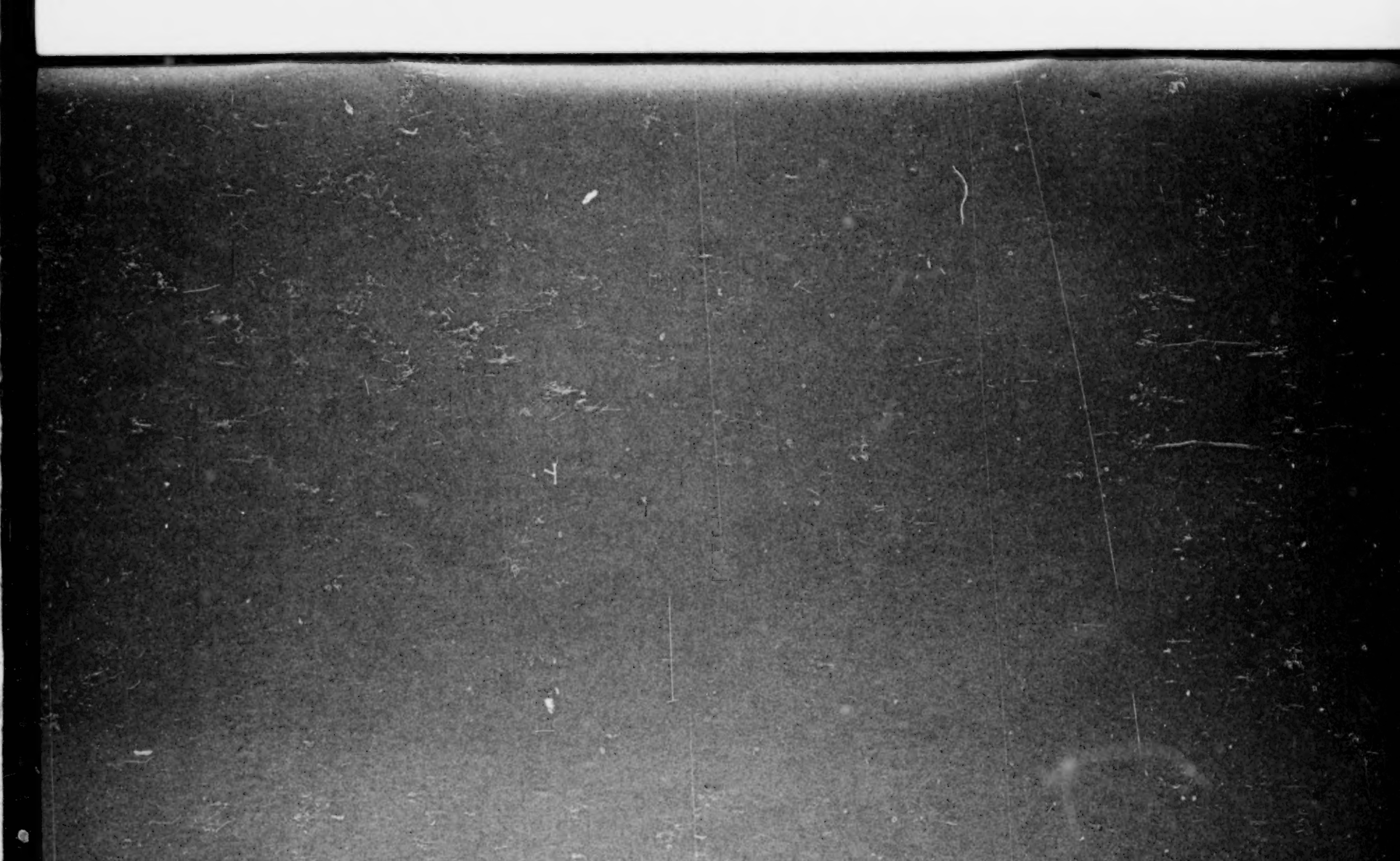

QUESTION PRESENTED

Whether back pay and liquidated damages received in settlement of litigation under the Age Discrimination in Employment Act are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement	3
A. *Commissioner* v. *Schmitz*	3
B. *Commissioner* v. *Keller*	10
C. *Commissioner* v. *Rice*	11
Reasons for granting the petition	13
Conclusion	13
Appendix A	1a
Appendix B	3a
Appendix C	12a
Appendix D	14a
Appendix E	35a
Appendix F	37a
Appendix G	39a

TABLE OF AUTHORITIES

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	6
Commissioner v. *Miller*, 914 F.2d 586 (4th Cir. 1990)	6, 9
Commissioner v. *Schleier*, cert. granted (Nov. 14, 1994) (No. 94-500)	9, 13
Downey v. *Commissioner*, 97 T.C. 150 (1991), supp. op., 100 T.C. 634 (1993), rev'd, 33 F.3d 836 (7th Cir. 1994), petition for reh'g denied (Nov. 18, 1994)	5, 7, 9
Hawkins v. *United States*, 30 F.3d 1077 (9th Cir. 1994)	8, 9
Pistillo v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990)	5, 6

Cases—Continued: Page

Redfield v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991) 11
Rickel v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990) 5, 6
United States v. *Burke*, 112 S. Ct. 1867 (1992) ..6, 7, 11, 12

Statutes and regulation:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*:
29 U.S.C. 623(a)(1) 4, 10
29 U.S.C. 626(b) 4
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 6
Internal Revenue Code (26 U.S.C.):
§ 61(a) 2
§ 104(a) 2
§ 104(a)(2) 3, 5, 6, 7, 8, 9, 10, 11, 12
§ 6512(b) 5, 11
29 U.S.C. 216(b) 4
29 U.S.C. 217 4
26 C.F.R. 1.104-1(c) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these three cases. See Rule 12.2 of the Rules of this Court.

OPINIONS BELOW

1. The opinion of the court of appeals in *Commissioner* v. *Schmitz* (App., *infra*, 14a-34a) is reported at 34 F.3d 790. The opinion of the Tax Court (App., *infra*, 35a-36a) is unreported.

2. The opinion of the court of appeals in *Commissioner* v. *Keller* (App., *infra*, 1a-2a) is unreported. The opinion of the Tax Court (App., *infra*, 3a-11a) is unofficially reported at 62 T.C.M. (CCH) 401.

3. The opinion of the court of appeals in *Commissioner* v. *Rice* (App., *infra*, 37a-38a) is unreported. The opinion of the district court (App., *infra*, 39a-50a) is reported at 834 F. Supp. 1241.

JURISDICTION

The judgment of the court of appeals in *Commissioner* v. *Schmitz* (App., *infra*, 14a) was entered on August 30, 1994. The judgment of the court of appeals in *Commissioner* v. *Keller* (App., *infra*, 1a) was entered on August 29, 1994. The judgment of the court of appeals in *Commissioner* v. *Rice* (App., *infra*, 37a) was entered on September 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a), provides in relevant part:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.

2. Section 104(a) of the Internal Revenue Code, 26 U.S.C. 104(a), provides in relevant part:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
>
> * * * * *
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness
>
> * * * * *

3. Section 104-1(c) of the Treasury Regulations, 26 C.F.R. 1.104-1(c) provides:

> Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

STATEMENT

A. *Commissioner* v. *Schmitz*

1. Respondent John A. Schmitz is a former employee of United Airlines, Inc. (App., *infra*, 15a).[1] Pursuant to an established policy of United Airlines, respondent's employment was terminated when he reached the age of sixty. Respondent thereafter filed

---

[1] Respondent's wife Mary is a party to this case solely because the couple filed a joint return during the year in question.

a complaint in federal district court alleging that his termination violated the Age Discrimination in Employment Act of 1967 (ADEA), which (with exceptions not relevant here) makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623 (a)(1)). The remedies for an unlawful discharge under the ADEA include reinstatement, back pay, injunctive and declaratory relief and attorneys fees. See 29 U.S.C. 626(b); 29 U.S.C. 216(b), 217. The ADEA also authorizes an additional award of "liquidated damages" in an amount equal to the back pay award "in cases of willful violations" of that Act. 29 U.S.C. 626(b).

Respondent's complaint was consolidated within a class action suit against United Airlines (App., *infra*, 15a). In 1986, the class action was settled under an agreement providing for monetary payments to the class members. One half of the settlement payment was attributed to "back pay," and the other half was attributed to "liquidated damages" (*ibid.*). As a result of the settlement, respondent received "back pay" of $57,525 and "liquidated damages" in the same amount (*ibid.*).

Respondent reported the "back pay" as income on his 1986 tax return. He did not, however, report the "liquidated damages" that he received under the settlement (App., *infra*, 15a). The Commissioner of Internal Revenue issued a notice of deficiency to respondent, asserting that the liquidated damages were improperly excluded from his income (*ibid.*).

2. Respondent commenced this case in Tax Court to obtain a redetermination of the asserted deficiency. The petition alleged that the liquidated damages portion of the settlement payment was properly excluded

from gross income under Section 104(a)(2) of the Internal Revenue Code, which provides that "gross income does not include" (26 U.S.C. 104(a)(2))

> the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

The petition further alleged that the "back pay" portion of the settlement payment, which had been reported as income on respondent's 1986 return, was also excludable from gross income under Section 104(a)(2) (App., *infra*, 15a). Respondent therefore sought a determination of overpayment (as authorized by 26 U.S.C. 6512(b)).

a. Proceedings on respondent's case were deferred pending the Tax Court's disposition of the lead case arising out of the United Airlines settlement agreement, *Downey* v. *Commissioner*, 97 T.C. 150 (1991), supp. op., 100 T.C. 634 (1993), rev'd, 33 F.3d 836 (7th Cir. 1994), petition for reh'g denied (Nov. 18, 1994).

In its original opinion in *Downey*, the Tax Court (in a reviewed opinion with six judges dissenting in part), held that back pay and liquidated damages received under the ADEA are excludable from gross income under Section 104(a)(2). With respect to back pay, the Tax Court expressly adopted (97 T.C. at 166-170) the reasoning of *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990), and *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990), which held that back pay awards under the ADEA are excludable from gross income because (i) an ADEA suit alleges a violation of a duty that arises by operation of a statute and not by virtue of a contract and (ii)

statutes addressing discrimination in the workplace had been characterized by other courts as involving personal injury. 900 F.2d at 662-663; 912 F.2d at 149-150.

With respect to liquidated damages, the Tax Court in *Downey* rejected the Commissioner's contention that ADEA liquidated damages—like punitive damages—are paid because of the employer's willful misconduct, rather than "on account of personal injuries" (26 U.S.C. 104(a)(2)) to the employee, and are therefore not excludable from gross income under the plain language of the statute. See *Commissioner* v. *Miller*, 914 F.2d 586 (4th Cir. 1990). The Tax Court held that, while ADEA liquidated damages serve a punitive purpose, these damages, when viewed from the victim's perspective, represent compensation for nonpecuniary losses. 97 T.C. at 171-173.

b. The Tax Court withheld entry of its final decision in *Downey* pending this Court's decision in *United States* v. *Burke*, 112 S. Ct. 1867 (1992). In *Burke*, this Court held that back pay awards received in settlement of litigation under the pre-1991 version of Title VII of the Civil Rights Act of 1964 are not excludable from gross income under Section 104(a)(2). In reaching that conclusion, the Court emphasized that a statute "whose sole, remedial focus is the award of backwages" (112 S. Ct. at 1874) does not represent a tort-like remedy of a personal injury but instead represents redress for "legal injuries of an economic character" (*id.* at 1873, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)). The Court concluded that a back pay remedy that redresses an economic injury is "not excludable from gross income as 'damages received . . . on

account of personal injuries' under § 104(a)(2)." 112 S. Ct. at 1874.

After this Court issued its decision in *Burke*, the Tax Court granted the Commissioner's motion for reconsideration of the *Downey* decision. In a supplemental opinion in *Downey* (with several separate opinions), the Tax Court emphasized that one of the traditional hallmarks of tort liability is the availability of a broad range of damages to compensate the victim, including punitive damages when the defendant's conduct was intentional or reckless. 100 T.C. at 635-637. The Tax Court observed that, in contrast to the pre-1991 version of Title VII involved in *Burke* (which limited the available remedies to back pay and equitable relief, see 112 S. Ct. at 1872-1874 & nn.8, 12), the ADEA provides "a range of remedies, including both unpaid wages and 'liquidated damages.'" 100 T.C. at 636. The Tax Court concluded that the ADEA "evidences a tortlike conception of injury and remedy" because liquidated damages under the ADEA compensate the victim of age discrimination for nonpecuniary losses and also serve a deterrent or punitive purpose. *Ibid.* The Tax Court therefore reaffirmed its prior holding that all damages received in ADEA litigation are excludable from gross income under Section 104(a)(2). 100 T.C. at 637.

c. On June 30, 1993, the Tax Court entered an order in the present case (App., *infra*, 35a-36a) granting respondent's motion for summary judgment based on the court's ruling in *Downey*.

3. The Commissioner appealed the Tax Court's ruling in the present case to the Ninth Circuit and appealed the Tax Court's ruling in *Downey* to the Seventh Circuit. The Commissioner also appealed the

Tax Court's ruling in an identical case involving another party to the United Airlines settlement agreement (*Schleier* v. *Commissioner*, 5th Cir. No. 93-5555) to the Fifth Circuit.

a. The Ninth Circuit affirmed the decision of the Tax Court in this case (App., *infra*, 14a-34a). The court agreed with the Tax Court's conclusion that the ADEA represents a "tort-like" cause of action. The court reasoned that the "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*" (App., *infra*, 20a). The court therefore concluded that ADEA recoveries are excludable from income under Section 104(a)(2).

The court of appeals also rejected the Commissioner's further contention that, even if ADEA represents a "tort-type" recovery for a personal injury, the liquidated damages component of that recovery is subject to tax in any event because it does not represent an award "on account of personal injuries" (26 U.S.C. 104(a)(2)) but is instead a penalty "on account of" the employer's willful misconduct (App., *infra*, 22a-28a). See *Hawkins* v. *United States*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages awards not excludable from gross income under Section 104(a)(2)). The court stated that, although liquidated damages under the ADEA are awarded to punish and deter "willful" violations of the statute, they are excluded from income under Section 104(a)(2) because they "compensate victims for damages which are too obscure and difficult to prove" (App., *infra*, 23a).

Judge Trott filed a concurring opinion in which he agreed with the majority that back pay under the ADEA redresses a "tort-like" personal injury (App., *infra*, 29a). He concluded, however, that ADEA

liquidated damages are like other types of punitive damages that the Ninth Circuit had held are *not* excludable from income under Section 104(a)(2) (App., *infra*, 29a-34a, citing *Hawkins* v. *United States*, 30 F.3d at 1079-1084).

b. On the Commissioner's appeal from the *Downey* decision, the Seventh Circuit reversed the Tax Court, holding that ADEA back pay and liquidated damages awards are *not* excluded from income under Section 104(a)(2). The Seventh Circuit reasoned that (33 F.3d at 839):

> *Burke* stands for the proposition that a federal anti-discrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax-exempt treatment under § 104(a)(2).

The court noted that the only damages remedies available under the ADEA are back pay and liquidated damages and that neither of those remedies "compensate for the intangible elements of a personal injury" (33 F.3d at 840). Because the limited remedies available under the ADEA thus lack "an essential element of a tort-type claim," the Seventh Circuit concluded that, under this Court's analysis in *Burke*, the damages awarded under that statute "cannot be excluded from taxation under § 104(a)(2)" (33 F.3d at 840).

c. The Fifth Circuit affirmed the Tax Court's opinion in *Commissioner* v. *Schleier*, *supra*. The Commissioner filed a petition for a writ of certiorari from that decision, which this Court granted on November 14, 1994. *Commissioner* v. *Schleier*, No. 94-500.

B. *Commissioner* v. *Keller*

1. Respondent Howard H. Keller is also a former employee of United Airlines, Inc.[2] Pursuant to the established policy of United Airlines, respondent's employment was also terminated when he reached the age of sixty (App., *infra*, 4a). Respondent thereafter filed a complaint in district court alleging that his termination violated the Age Discrimination in Employment Act, 29 U.S.C. 623(a)(1).

Respondent's complaint was consolidated within a class action suit against United Airlines (App., *infra*, 5a). In 1986, the class action was settled under an agreement providing for monetary payments to the class members. One half of the settlement payment was attributed to "back pay," and the other half was attributed to "liquidated damages" (*id.* at 6a). As a result of the settlement, respondent received "back pay" of $28,442 and "liquidated damages" in the same amount (*ibid.*).

Respondent reported the "back pay" as income on his 1986 tax return. He did not, however, report the "liquidated damages" that he received under the settlement (App., *infra*, 6a). The Commissioner of Internal Revenue issued a notice of deficiency to respondent, asserting that the liquidated damages were improperly excluded from his income.

2. Respondent commenced this case in Tax Court to obtain a redetermination of the asserted deficiency. The petition alleged that the liquidated damages portion of the settlement payment was properly excluded from gross income under Section 104(a)(2) of the

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[2] Respondent's wife Marianne is a party to this case solely because the couple filed a joint return during the year in question.

Internal Revenue Code, 26 U.S.C. 104(a)(2). Respondent subsequently amended the petition to allege that the "back pay" portion of the settlement payment, which had been reported as income on his 1986 return, was also excludable from gross income under Section 104(a)(2) (App., *infra*, 3a). Respondent therefore sought a determination of overpayment (as authorized by 26 U.S.C. 6512(b)).

The Tax Court issued an opinion granting judgment to respondent on the authority of that court's original opinion in *Downey* (App., *infra*, 8a-11a). The court thereafter denied the Commissioner's motion for reconsideration. The court reasoned (*id.* at 13a) that, because appeal in this case was to the Ninth Circuit, the decision in *Redfield* v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991), would be controlling. In *Redfield*, which was decided before this Court's decision in *United States* v. *Burke*, *supra*, the court of appeals held that "economic" damages awarded under the ADEA are excludable from gross income under Section 104(a)(2).

3. The same panel of the Ninth Circuit that affirmed the Tax Court's decision in *Commissioner* v. *Schmitz* (App., *infra*, 14a) issued an order (App., *infra*, 1a) affirming the Tax Court's decision in *Commissioner* v. *Keller* on the authority of *Schmitz*.

C. *Commissioner* v. *Rice*

1. Respondent Michael L. Rice is a former employee of Stauffer Chemical Company.[3] Upon termination of his employment, respondent brought suit

[3] Respondent's wife Billie is a party to this case solely because the couple filed a joint return during the year in question.

against Stauffer alleging that his termination violated the Age Discrimination in Employment Act. Following a jury trial, respondent was awarded $101,395 in "general damages" and $100,000 in "liquidated damages" (App., *infra*, 39a-40a).

Respondent reported the "general damages" award as income on his 1988 tax return. He did not, however, report the "liquidated damages" award on his return (App., *infra*, 40a-41a). Respondent subsequently filed a refund claim with the Internal Revenue Service asserting that the "general damages" award was excludable from gross income under Section 104(a)(2) of the Internal Revenue Code. When the Service denied respondent's refund claim, he commenced this refund suit in federal district court.

2. The district court agreed with respondent's contention that the ADEA award was excludable from gross income under Section 104(a)(2). The court concluded that, under this Court's decision in *United States* v. *Burke*, the critical inquiry is whether the ADEA redresses a "tort-like" personal injury (App., *infra*, 43a). The court concluded that (i) ADEA damages remedies serve both a compensatory and a punitive purpose, (ii) they therefore "sound[] basically in tort" and (iii) they are therefore excluded from income under Section 104(a)(2) (App., *infra*, 45a-47a).[4]

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[4] Respondent also received a punitive damages payment with respect to a state-law claim that he had asserted against his employer. The district court held that this punitive damages award, as well as the post-judgment interest that respondent received on his ADEA award, were not excludable from income under Section 104(a)(2) (App., *infra*, 47a-49a). Respondent did not appeal those determinations.

3. Relying on its recent decision in *Commissioner* v. *Schmitz* (App., *infra*, 14a), the court of appeals affirmed the judgment of the district court in *Commissioner* v. *Rice* (App., *infra*, 35a-36a).

REASONS FOR GRANTING THE PETITION

These three cases present the same question that is presented in *Commissioner* v. *Schleier*, cert. granted, No. 94-500. The petition should therefore be held and disposed of as appropriate in light of the Court's disposition of *Schleier*.[5]

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Commissioner* v. *Schleier*, No. 94-500.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys

NOVEMBER 1994

[5] We have provided respondents with a copy of the petition and reply brief filed by the Commissioner in the *Schleier* case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-70787

Tax Ct. No. 6914-90

MARIANNE KELLER; HOWARD H. KELLER,
PETITIONERS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLANT

Appeal from a Decision of the
United States Tax Court

Submitted April 11, 1994**
San Francisco, California

[Filed Aug. 29, 1994]

MEMORANDUM*

Before: GOODWIN, FERGUSON, and TROTT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

For the reasons expressed in our opinion in *Schmitz v. Commissioner*, No. 93-70960, the judgment of the tax court is AFFIRMED.

APPENDIX B

T.C. Memo. 1991-373

UNITED STATES TAX COURT

Docket No. 6914-90

HOWARD H. and MARIANNE KELLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed August 8, 1991

MEMORANDUM OPINION

COHEN, *Judge*: Respondent determined a deficiency of $11,721 in petitioners' Federal income tax for 1986. In the petition, petitioners challenged respondent's determination that they are liable for income taxes on liquidated damages received by Howard H. Keller in settlement of a lawsuit brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. sec. 621 et seq (1988). In an amendment to the petition, petitioners allege that they are also entitled to exclude from their taxable income the amount of the settlement attributable to back pay. The issue for determination is whether all or any portion of the

settlement amount is excludable from income under section 104(a)(2). All section references are to the Internal Revenue Code as amended and in effect for the year in issue.

Facts

All the facts have been stipulated, and the issue has been presented on cross-motions for summary judgment. Petitioners resided in Reno, Nevada, at the time the petition was filed. Howard H. Keller (petitioner) was one of a group of individuals (the ADEA plaintiffs) who had been employed as pilots or flight engineers by United Airlines, Inc. (United), and who had been fired from their jobs upon reaching the age of 60.

Petitioner, along with other similarly placed former employees of United, filed complaints against United in the United States District Court for the Northern District of Illinois pursuant to section 7(c) of the ADEA, as amended, 29 U.S.C. sec. 626(c). Petitioner alleged, among other things:

> 8. Prior to the date of his sixtieth birthday, each plaintiff was employed by defendant. The position of each was that of Captain (pilot in command) on defendant's commercial aircraft.
>
> 9. As a Captain, each plaintiff performed his duties satisfactorily under the policies and regulations of defendant and the Federal Aviation Administration.
>
> 10. Immediately prior to the date of his sixtieth birthday, each plaintiff maintained seniority sufficient to allow him to work in the positions of Captain, First Officer, or Second Officer.
>
> 11. The Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. sec. 121.383(c), bars

each plaintiff from serving as a Captain or First Officer (second in command) in defendant's operations under 14 C.F.R. Part 121, after the date of his sixtieth birthday.

12. But for the Age 60 Rule, each plaintiff was able and qualified to continue working in defendant's employ as a Captain after the date of his sixtieth birthday.

13. The Age 60 Rule does not prevent plaintiffs from serving in defendant's employ in a flight or non-flight position other than Captain and First Officer (second in command), after the dates of their sixtieth birthdays.

14. The Age 60 Rule does not prevent plaintiffs from serving in defendant's employ as Second Officers (flight engineers), after the dates of their sixtieth birthdays.

15. Each plaintiff sought to continue his employment with defendant beyond the date of his sixtieth birthday.

16. Defendant terminated each plaintff's employment and required him to retire shortly after the date of his sixtieth birthday.

17. Both before and after the date of each plaintiff's sixtieth birthday, defendant refused and continues to refuse to permit each plaintiff to continue his employment in a position not affected by the Age 60 Rule.

The actions relative to the complaints were consolidated as a single class action lawsuit (the ADEA lawsuit).

The remedies sought in the ADEA lawsuit consisted of (i) injunctive relief; (ii) monetary damages for back pay and other pecuniary losses; and (iii) liquidated damages under 29 U.S.C. sec. 216(b)

in an amount equal to the total amount of back pay and pecuniary losses.

In 1982, petitioner and the other ADEA plaintiffs were awarded back pay and liquidated damages by a jury in the ADEA lawsuit. On appeal, the decision of the district court was reversed on procedural grounds and remanded for a new trial. *Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984).

Before a second trial was completed, on June 30, 1986, United and the ADEA plaintiffs entered into a three-part settlement agreement. The overall settlement amount was identified as attributable to "back pay and liquidated damages," with one-half of the amount stipulated to be back pay subject to applicable withholding and payroll taxes and the other half attributable to "liquidated damages" not subject to income taxes.

In accordance with the settlement agreement, petitioner received "back pay wages" in the amount of $28,442 and "liquidated damages" in the amount of $28,442.

On their Federal income tax return for 1986, petitioners included the sum of $28,442 attributable to back pay as income but did not include the sum of $28,442 attributable to liquidated damages.

Discussion

Section 104(a)(2) excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." Section 1.104-1(c), Income Tax Regs., provides that "the term 'damages received (whether by

suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution."

The ADEA, as amended, prohibits arbitrary discrimination in the workplace based on age. *Trans World Airline, Inc. v. Thurston*, 469 U.S. 111, 120 (1985). The preamble to the ADEA declares its purpose is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. sec. 621(b).

Section 4(a)(1) of the ADEA proscribes differential treatment of older workers "with respect to * * * compensation, terms, conditions, or privileges of employment." 29 U.S.C. sec. 623(a). This proscription presently applies to all persons between the ages of 40 and 70. 29 U.S.C. sec. 631(a). The substantive provisions of the ADEA are, with a few minor exceptions, identical in terms to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000(e) et seq. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121.

Section 7(b) of the ADEA, 81 Stat. 604, 29 U.S.C. sec. 626(b), provides that the rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). See 29 U.S.C. sec. 626(b), incorporating 29 U.S.C. secs. 211(b), 216(b), 216(c), 217, 626(b), and 626(c). The remedial provisions of the two statutes, however, are not identical.

The FLSA permits aggrieved employees to recover "unpaid minimum wages" or "unpaid overtime com-

pensation," as well as an equal amount of "liquidated damages" for employer violations of minimum wage and maximum hour laws. 29 U.S.C. sec. 216(b). Because violations of the ADEA do not typically involve an employer's failure to pay minimum or overtime wages, however, monetary damages for the discriminatory refusal to hire or promote an employee on the basis of age are likely to be less precisely measurable. *Rodriquez v. Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977).

Section 7(b) of the ADEA provides that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." 29 U.S.C. sec. 626(b). In addition, section 7(b) empowers the courts "to grant such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. sec. 626(b).

In *Downey v. Commissioner*, 97 T.C. —— (1991), we reconsidered our Court-reviewed opinion in *Rickel v. Commissioner*, 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990). As in *Downey*, petitioners contend that all of the settlement proceeds are excludable from income as amounts received on account of personal injury under section 104(a)(2). Respondent contends that all of the amounts received are includable in taxable income.

In *Downey*, we reaffirmed our prior holding in *Rickel v. Commissioner*, 92 T.C. 510, 521-522 (1989), revd. on other grounds 900 F.2d 655 (3d Cir. 1990), that liquidated damages under the ADEA are in-

tended to compensate the victim of age discrimination for certain nonpecuniary losses and, thus, are excludable from gross income under section 104(a)(2). We also held that the "non-liquidated" portion of the amount received by the ADEA plaintiff was excludable from taxable income. We overruled our prior opinion in *Rickel* to the extent that it held one-half of the damages to be taxable. We follow *Downey* here.

Respondent asks, however, that we reconsider our opinion in *Rickel* with respect to exclusion of ADEA liquidated damages under section 104(a), citing the opinion of the Court of Appeals for the Fourth Circuit in *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990), revg. and remanding 93 T.C. 330 (1989). As respondent asserts, the Court of Appeals for the Ninth Circuit, to which our decision in this case is appealable, has characterized liquidated damages under the ADEA as punitive damages intended to deter conduct of an employer. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494 (9th Cir. 1986); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981).

In *Miller*, the Court of Appeals for the Fourth Circuit held that punitive damages were not excludable under section 104(a)(2) even though they were awarded in an action arising out of defamation. In a footnote, the Court of Appeals for the Fourth Circuit stated:

> Nor is there inconsistency between, on the one hand, our decision to distinguish compensatory relief from punitive relief and, on the other hand, the proposition that courts should not distinguish, for sec. 104(a)(2) purposes, among the kinds of injurious consequences flowing from

> a defendant's invasion of a plaintiff's tort-type right. See, *e.g.*, *Rickel v. Commissioner*, 900 F.2d 655, 657-664 (3d Cir. 1990) (damages for economic harm flowing from a tortious injury as equally excludable as damages for physical harm). The issue in the case before us is not whether certain kinds of compensation are excludable but whether punitive damages, which serve no compensatory function, are excludable. See *Rickel*, 900 F.2d at 661 n.8, 666 n.18 (emphasizing that the question of excludability of punitive damages was not presented). [914 F.2d at 591 n.8.]

The Court of Appeals for the Third Circuit in *Rickel* did not discuss the question of punitive damages because the Commissioner did not appeal our decision.

In *Rickel* and in *Downey*, we concluded that the liquidated damages awarded to an ADEA plaintiff were compensatory in the hands of the taxpayer. Thus we did not reach the issue of taxability of punitive damages. If, however, the liquidated damages were characterized as punitive damages for tax purposes, we would be bound to follow here the opinion in *Roemer v. Commissioner*, 716 F.2d 693, 696 (9th Cir. 1983), revg. 79 T.C. 398 (1982), to the extent squarely in point. *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971); *Lawrence v. Commissioner*, 27 T.C. 713 (1957). In *Roemer*, the Court of Appeals held that all damages flowing from a personal injury (defamation), including punitive damages, are excludable under section 104(a).

In *Commissioner v. Miller*, 914 F.2d 586, 591 (4th Cir. 1990), revg. and remanding 93 T.C. 330 (1989),

the Court of Appeals for the Fourth Circuit took the opposite view and stated:

> It is of little moment that the Commissioner at one time construed sec. 104(a)(2) to exclude from income punitive damages, and that the Ninth Circuit held (relying on Rev. Rul. 75-45, 1975-1 C.B. 47) the then Commissioner's "liberal" interpretation to control. See *Roemer*, 716 F.2d at 700. The Ninth Circuit was merely presenting proof that when in Rome one should do as the Romans do. However, in the first place, the Commissioner's subsequent shift in position calls for *Roemer*, as a Roman, to shift also. * * *

We cannot conclude that the Court of Appeals for the Ninth Circuit would not apply *Roemer* to liquidated damages received as a result of the tort of discrimination. We decline to assume that it would now shift its position. Even assuming, therefore, that the Court of Appeals would regard the liquidated damages as punitive for tax purposes, they are excludable under section 104.

We note that section 104(a)(2) was amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, sec. 7641(a), 103 Stat. 2106, 2379, with respect to amounts received after July 10, 1989, in taxable years ending after such date, for punitive damages in a case not involving physical injury or sickness. That amendment does not affect our opinion in this case.

Based on our opinion in *Downey v. Commissioner*, *supra*, petitioners' Motion for Summary Judgment will be granted and respondent's Motion for Summary Judgement will be denied.

Decision will be entered for the petitioners.

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

Docket No. 6914-90

HOWARD H. and MARIANNE KELLER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER

On August 24, 1992, Respondent's Motion to Vacate Decision and Respondent's Motion for Leave to File a Motion for Reconsideration Out of Time were filed. As set forth in respondent's motions, decision in this case was held in abeyance pending the decision of the United States Supreme Court in *Burke v. United States*, 929 F.2d 1119 (6th Cir. 1991), revd. —— U.S. ——, 112 S. Ct. 1867 (1992). As discussed in a subsequent conference call among the parties and the Court, however, the decision of the Supreme Court in *Burke* did not address directly the issue in this case, to wit, application of section 104(a)(2), I.R.C., to damages received in settlement of a claim under the Age Discrimination in Employment Act of 1967.

Respondent contends that reconsideration of this case is appropriate in the event that a motion for re-

consideration is granted in *Downey v. Commissioner*, 97 T.C. 150, 168 (1991). This case, however, is appealable to the Court of Appeals for the Ninth Circuit. That Court of Appeals has spoken directly on this issue in a case decided subsequent to our opinion in this case, *Redfield v. Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991). Even if reconsideration were granted in *Downey* and a different result were reached in this Court, we would be bound in this case to apply the existing law in the Ninth Circuit. See *Golsen v. Commissioner*, 54 T.C. 742, 756-757 (1970), affd. 445 F.2d 985 (10th Cir. 1971). Upon due consideration, it is hereby

ORDERED: That Respondent's Motion to Vacate Decision and Respondent's Motion for Leave to File a Motion for Reconsideration Out of Time, filed August 24, 1992, are denied.

(Signed) Mary Ann Cohen
MARY ANN COHEN
Judge

Dated: Washington, D. C.
August 27, 1992

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-70960

Tax Court No. 4844-90

JOHN A. SCHMITZ, MARY B. SCHMITZ,
PETITIONERS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLANT

Appeal from a Decision of the
United States Tax Court

Argued and Submitted

April 11, 1994—San Francisco, California

Filed August 30, 1994

Before: Alfred T. Goodwin, Warren J. Ferguson
and Stephen S. Trott, Circuit Judges

Opinion by Judge Goodwin;
Concurrence by Judge Trott

OPINION

GOODWIN, Circuit Judge:

The Commissioner appeals a tax court summary judgment granted in favor of taxpayers John and Mary Schmitz. The Commissioner argues that damages the Schmitzes received in settlement of an Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, lawsuit are taxable income. The tax court held that the Schmitzes' ADEA settlement was excludable from gross income as "damages received . . . on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2) (1988). We affirm.

I.

John Schmitz is a former employee of United Airlines, Inc. ("United") and a plaintiff in an ADEA class action against United. In 1986, United paid Schmitz $115,050 in settlement of his age discrimination claims. According to the settlement agreement, half of this payment was "back pay" and the other half was "ADEA liquidated damages."

The Schmitzes initially reported the back wages portion of the settlement as gross income received in 1986, excluding the liquidated damages. The Commissioner issued a notice of deficiency, alleging that the Schmitzes' entire award was taxable. The Schmitzes' filed a tax court petition, arguing that the liquidated damages portion of the settlement was excludable from gross income under 26 U.S.C. § 104(a)(2). After the Third Circuit decided *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990), the Schmitzes amended their petition, claiming that both the back pay and the liquidated damages were excludable.

The tax court held that the Schmitzes' entire settlement was excludable from gross income under *Downey v. Commissioner*, 97 T.C. 150 (1991), *aff'd on reconsideration*, 100 T.C. 634 (1993), *appeal pending*, No. 93-3763 (7th Cir. Nov. 17, 1993). The Commissioner appealed.

II.

We review tax court decisions on the same basis as civil bench trials held in federal district court. *Ball, Ball, & Brosamer, Inc. v. Commissioner*, 964 F.2d 890, 891 (9th Cir. 1992). Thus, we review the tax court's grant of summary judgment de novo to determine whether there are any genuine issues of material fact and whether the tax court correctly applied the law. *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1446 (9th Cir. 1994). Because this case presents no genuine issues of material fact, we agree that summary judgment was appropriate. We therefore review the tax court's legal conclusions de novo, *Pacific First Fed. Savs. Bank v. Commissioner*, 961 F.2d 800, 803 (9th Cir.), *cert. denied*, 113 S. Ct. 209 (1992), construing the relevant exemptions narrowly in favor of taxation. *United States v. Centennial Savs. Bank*, 499 U.S. 573, 583-84 (1991); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988).

III.

At the time of the Schmitzes' settlement,[1] & 104 (a) (2) provided:

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[1] Congress has since amended § 104(a) (2) to provide that punitive damages received in cases not involving physical injury are not excludable. Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379 (1989). However, these amendments are expressly

§ 104. Compensation for injuries or sickness

. . . [G]ross income does not include— . . .
(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . .

IRS regulations define "damages received" as "amount[s] received . . . through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. § 1-104-1 (c) (1993).

In *Hawkins*, we set forth a two-part test for determining whether damages received in a lawsuit are excludable under § 104(a)(2) (1988). *United States v. Hawkins*, No. 93-15828, slip. op., —— F.3d ——, —— (9th Cir. July 19, 1994). We said a taxpayer must show both (1) that the underlying cause of action was tort-like within the meaning of *United States v. Burke*, 112 S. Ct. 1867, 1870 (1992), and 26 C.F.R. § 1.104-1(c), and (2) that the damages were received "on account of" the taxpayer's personal injury. *Id.* We must therefore decide (A) whether the ADEA creates a tort-like cause of action and (B) whether the Schmitzes' back pay and liquidated damages were received on account of their personal injuries.

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limited to punitive damages received after June 10, 1989, and do not apply to the Schmitzes' 1986 award. We express no opinion on taxation of ADEA liquidated damages received after June 10, 1989, as that issue is not before us.

A. *ADEA Creates a "Tort-like" Cause of Action*

Until recently, the case law firmly established that ADEA lawsuits were "tort-like" within the meaning of § 104(a)(2) and 26 C.F.R. § 1.104-1(c). *See Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990); *Downey v. Commissioner*, 97 T.C. 150 (1991). However, these cases relied on *Threlkeld v. Commissioner*, 87 T.C. 1294, 1308 (1986), *aff'd* 848 F.2d 81 (6th Cir. 1988), which held that damages are excludable under § 104(a)(2) if they were "received on account of any invasion of rights that an individual is granted by being a person in the sight of the law."

The Supreme Court recently changed this analysis, suggesting that even lawsuits which meet the *Threlkeld* test might not be tort-like for purposes of § 104(a)(2) if they do not "evidence[] a tort-like conception of injury and remedy." *United States v. Burke*, 112 S. Ct. 1867, 1873 (1992). The Court, discussing damages awarded under the pre-1991 version of Title VII, agreed that "discrimination could constitute a 'personal injury' for purposes of § 104(a)(2)." *Id.* However, the Court found that the pre-1991 version of Title VII was not tort-like because it did not provide for jury trials or "allow awards for compensatory or punitive damages," instead "limit[ing] available remedies to back pay, injunctions, and other equitable relief." *Id.* at 1873-74.[2] According to the

[2] Congress has since amended Title VII to allow jury trials, compensatory damages, and punitive damages. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). Thus, the current version of Title VII may redress a tort-like per-

Court, this unavailability of jury trials and failure to "recompense Title VII plaintiffs for anything beyond the wages properly due them" distinguish pre-1991 Title VII actions from ordinary tort actions and actions filed under other federal antidiscrimination statutes, such as Title VIII and 42 U.S.C. § 1981. *Id.* at 1874.

Most post-*Burke* courts addressing the issue have held that ADEA damages are still excludable, even under the Supreme Court's more restrictive test. *See, e.g., Purcell v. Sequin State Bank & Trust Co.*, 999 F.2d 950, 960-61 (5th Cir. 1993); *Downey v. Commissioner*, 100 T.C. 634, 637 (1993); *Bennett v. United States*, 30 Fed. Cl. 396 (1994); *Rice v. United States*, 834 F. Supp. 1241, 1243-45 (E.D. Cal. 1993), *appeal pending*, No. 93-16272 (9th Cir. Sept. 9, 1993); *cf. Abrams v. Lightolier*, 841 F. Supp. 584, 596 (D. N.J. 1994) (addressing a state law discrimination award).[3] As these courts have noted, ADEA, unlike the pre-1991 version of Title VII, provides for jury trials. *Bennett*, 30 Fed. Cl. at 399. In addition, while ADEA does not provide for nonpecuniary compensatory damages or punitive damages "by name", *Rice*, 834 F. Supp. at 1244, it does provide for "liquidated damages" in cases of willful discrimination. 29 U.S.C. § 626(b). These liquidated damages "serve to compensate the victim of age discrimination for certain nonpecuniary losses" and also serve "a deter-

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sonal injury. *See Burke*, 112 S. Ct. at 1874 n.12; Rev. Rul. 93-88.

[3] *But see Maleszewski v. United States*, 827 F. Supp. 1553 (N.D. Fla. 1993) (ADEA not tort-like); *Shaw v. United States*, —— F. Supp. ——, 1994 WL 237039 (M.D. Ala. Apr. 5, 1994) (following *Maleszewski*).

rent or punitive purpose." *Downey*, 100 T.C. at 637; *Rice*, 834 F. Supp. at 1244. Thus, unlike the unamended version of Title VII, ADEA does not simply recompense plaintiffs for the wages properly due them.

The Commissioner argues that the remedies available under ADEA are still "circumscribed" within the *Burke* Court's meaning, *Burke*, 112 S. Ct. at 1873, because, like the unamended version of Title VII, ADEA does not provide damages for plaintiffs' emotional distress or pain and suffering. *See Chancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Nation v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981). The Commissioner argues that ADEA liquidated damages represent only punitive damages, and thus the statute does not evidence a tort-like conception of remedy.

We disagree. The case law and legislative history indicate that ADEA liquidated damages have a compensatory as well as a punitive purpose. *See* Section B, *infra*. In addition, "*Burke* does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort-type right." *Bennett*, 30 Fed. Cl. at 400. As other courts have held, ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*. Moreover, even if ADEA liquidated damages have a punitive purpose, such a purpose appears more tort-like than contract-like.

We cannot accept the Commissioner's argument that ADEA actions are basically *ex contractu*. *See, e.g., Redfield*, 940 F.2d at 546 ("Nothing in ADEA

reflects a congressional attempt to rewrite the terms of employment contracts."). Contract rights arise from the parties' private-law relationship; each litigant's rights and duties depend primarily on the terms of their agreement. In contrast, a tort is "a 'legal wrong committted upon the person or property independent of contract' . . . 'a violation of some duty owing to the plaintiff, . . . generally, [arising] by operation of law and not by mere agreement of the parties.'" *Downey*, 97 T.C. at 160 (quoting Black's Law Dictionary, 1489 (6th ed. 1990). The public-law duty not to discriminate exists regardless of the parties' contractual relationship; ADEA applies not only to firing and promotion decisions, but also to hiring decisions, when no contract exists. *Downey*, 97 T.C. at 169; *Burke*, 112 S. Ct. at 1879-80 (O'Connor, J., dissenting). For convenience and for statute of limitations purposes, most courts classify discrimination and civil rights violations as torts. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

The *Burke* majority acknowledged that discrimination could be personal injury tort within the meaning of § 104(a)(2), as the pre-*Burke* courts had long held. 112 S. Ct. at 1873. The Court did not hold that employment discrimination, generally, was not a personal injury; it held only that the pre-1991 version of Title VII, with its "circumscribed remedies," did not evidence a tort-like conception of personal injury. *Id.* at 1873. In reaching this conclusion, the Court specifically relied on the unavailability of jury trials and the lack of compensatory or punitive damages in Title VII actions. Because both of these remedies are available under ADEA and because discrimination

constitutes a personal injury, we conclude that ADEA establishes a tort-like cause of action within the meaning of *Burke* and § 104(a)(2).

B. *The Schmitzes' ADEA Liquidated Damages Were Received "On Account of" Personal Injuries*

The Commissioner also argues that, even if ADEA creates a tort-like cause of action, the Schmitzes' *liquidated* damages are not excludable because these damages were awarded "on account of" United's willful misconduct, rather than "on account of" the Schmitzes' personal injury. § 104(a)(2).[4] We agree

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[4] The Commissioner does not make this argument about the Schmitzes' back pay award, apparently conceding that, if ADEA creates a tort-like cause of action, the Schmitzes' back pay or nonliquidated damages are excludable. We agree. Although this rule creates the somewhat anomalous result that back-pay and future earnings awarded in a lawsuit are not taxable, while "wages . . . paid in the ordinary course [of employment]" are fully taxable, *Burke*, 112 S. Ct. at 1874, this anomaly exists in physical injury cases as well. *Id.* at 1880 (O'Connor, J., dissenting). As the Third Circuit has noted, we must compare John Schmitz not to a current United employee, but to a United employee who can no longer work because of a lost arm or other personal injury. *See Rickel*, 900 F.2d at 664 ("Of course, it might be troubling to some that a sucecssful plaintiff in an ADEA suit will make out better, vis-a-vis federal income tax liability, than if the plaintiff had not been discriminated against in the first place. . . . [However,] the successful ADEA plaintiff is being treated no better (or worse now) than the typical tort victim who suffers a physical injury").

Under § 104(a)(2), if a taxpayer receives damages for a personal injury "[a]ll income [including lost wages] in compensation of that injury is excludable under section 104(a)(2)." *Threlkeld*, 848 F.2d at 84. *See also Burke*, 112 S. Ct. at 1880 (O'Connor, J., dissenting); *Purcell*, 999 F.2d

that § 104(a)(2)'s "on account of" language, as well as its title, "Compensation for Personal Injury or Sickness," implies that damages are not excludable unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury. *Hawkins*, —— F.3d at ——; *see also Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990); *Rice*, 834 F. Supp. at 1245-46; Rev. Rul. 84-108.[5]

However, we do not agree that ADEA liquidated damages are solely punitive in nature or that they do not bear any relation to the underlying personal injury. ADEA on its face provides for *"liquidated,"* not punitive, damages. 29 U.S.C. § 626(b). Liquidated damages were traditionally awarded to compensate victims for damages which are too obscure and difficult to prove. *See Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945) ("The liquidated

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at 960 ("Back pay awards are nontaxable when they redress a tort-like injury."); *Redfield*, 940 F.2d at 546; *Pistillo*, 912 F.2d at 150; *Rickel*, 900 F.2d at 664 ("[J]ust as in the case of a physical personal injury, all the damages received by the taxpayer on account of age discrimination are excludable under § 104(a)(2)"); *Downey*, 97 T.C. at 165-69.

The Commissioner does not indicate whether United paid Federal Insurance Contributions Act ("FICA") taxes on the backpay award; thus, we express no opinion on whether backpay received under ADEA constitutes "wages" for FICA purposes. *See Burke*, 112 S. Ct. at 1869 n.1; *Kendrick v. Jefferson County Bd. of Ed.*, 13 F.3d 1510; 1514 (11th Cir. 1994) (interpreting the Supreme Court's footnote as an "indicat[ion] that FICA taxation may be a different matter").

[5] *But see Horton v. Commissioner*, 100 T.C. 93 (1993), *appeal pending*, No. 93-1928 (6th Cir. July 13, 1993).

damage provision [of the Fair Labor Standard Act, on which ADEA is based] is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages."); *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 583-84 (1942) ("[L]iquidated damages . . . are compensation, not a penalty or punishment by the Government . . . the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."); *see also Black's Law Dictionary 6th Ed.* at 391 (1990) (liquidated damages, unlike penalties, represent a "good faith effort to estimate [the] actual damages that will probably ensue").

The concurrence contends that the term "liquidated," despite its appearance in the text of the statute, is a "misnomer," and that ADEA liquidated damages are in fact punitive damages.[6] However, ADEA liquidated damages differ from common law

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[6] In support of this assertion, the concurrence states that ADEA liquidated damages are distinguishable from FLSA liquidated damages because the former are awarded only for "willful" violations, while (according to the concurrence) latter are awarded "automatically." However, as the concurrence concedes in a footnote, FLSA also gives the judge discretion not to award liquidated damages (or to award reduced liquidated damages), if the violation is *not* willful. Thus, the difference between these two damages provisions is not nearly as great as the concurrence suggests: In ADEA, plaintiffs get liquidated damages if the violation was willful; in FLSA, they get liquidated damages unless the employer proves that the violation was not willful. While the burden of proof may differ, under both statutes, liquidated damages depend on the culpability of the employer.

punitive damages in significant ways. More importantly, we believe that looking beyond Congress's explicit language and attempting to discern whether Congress's "real purpose" was punitive or compensatory will "sow more confusion than clarification." If Congress said "liquidated," we will assume that Congress meant liquidated.

Nor do we believe that the "liquidated" label is in fact a misnomer. Unlike common law punitive damages, ADEA liquidated damages do bear a relation to the underlying personal injury: They must equal the plaintiff's total pecuniary loss. 29 U.S.C. § 626 (b); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348-49 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). Thus, unlike the punitive damages discussed in *Hawkins*, which were based on the defendant's conduct and wealth, and have no relation to the plaintiff's particular injury. ADEA liquidated damages are proportionate to the personal injury suffered: The more severe the plaintiff's economic injury, the greater her ADEA liquidated damage award.

As the Commissioner and the concurrence emphasize, ADEA liquidated damages likely also have a punitive purpose—they are available only for "willful" violations and serve not only to compensate but also deter. *See Trans World Airline, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (stating, in interpreting ADEA's "willfulness" requirement, that "Congress intended [ADEA] liquidated damages to be punitive in nature"); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556 (9th Cir. 1983), *aff'd* 472 U.S. 400 (1985) (stating, in a different context, that "[l]iquated damages are a substitution for punitive

damages and [are] intended to deter intentional violation of the ADEA") (internal quotations and citations omitted).[7]

However, the mere fact that liquidated damages are available in cases of "willful" discrimination does not transform them into punitive damages or eliminate their compensatory purpose. *Accord, Rivera v. Anaya*, 726 F.2d 564, 569 (9th Cir. 1984) (interpreting a similar double damage provision as "compensation, not a penalty" even though the damages at issue were available only for "intentional violations."). In enacting ADEA, Congress was likely attempting to balance the need to compensate victims and defer discrimination with the need to protect businesses from crushing liability. Unlike the concurrence, we see nothing "peculiar" in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of "nonwillful" discrimination: Congress has simply decided as a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages.

For purposes of § 104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer. *See Downey*, 97 T.C. at 171. Like the *Downey* Court, we do not believe *Thurston* addressed ADEA liquidated damages "from the *recipient*'s perspective" or found that ADEA liquidated damages, from the recipient's perspective, do not represent "compensation for those losses that are hard to calculate." *Id.* Rather, most courts recognize

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[7] *See also Riechman v. Bonsignore, Bragnati & Mazzona, P.C.*, 818 F.2d 278, 281-82 (2d Cir. 1987); *Lindsay v. American Cast Iron Pipe, Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987).

that ADEA liquidated damages serve *both* a compensatory and a deterrent function.[8] *See, e.g., Fortino v. Quasar, Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991); *Powers v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990); *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 753 (5th Cir. 1989); *Gilmer v. Interstate/ Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990); *Graefenhain v. Papst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987). The Con-

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[8] The concurrence asks "what's left to compensate?", citing cases holding that ADEA liquidated damages do not duplicate state damage awards for lost interest, emotional distress, and pain and suffering. However, we have also said that "[p]unitive . . . damages . . . unavailable under the ADEA, do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages." *Chancellier*, 672 F.2d at 1318. Moreover, exactly what injuries ADEA liquidated redress will inevitably vary from case to case; none of the cases the concurrence cites involve plaintiffs who were compensated for all of the damages mentioned. ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of other injuries. *Cf. Brooks v. Hilton Casinos Inc.*, 959 F.2d 757, 767 (9th Cir. 1992) (trial court did not abuse its discretion in refusing to award front pay where plaintiff received liquidated damages), *cert. denied*, 113 S. Ct. 300 (1992); *Cancellier*, 672 F.2d at 1319 (value of reinstatement is speculative especially where the discord between employee and employer may make reinstatement infeasible). Because each employee's injuries differ—in ways that cannot be calculated—we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive.

ference Report for the 1978 Amendments to ADEA supports this view:

> [ADEA] liquidated damages (calculated as an amount equal to the pecuinary loss) [] compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. . . . The ADEA as amended by this act does not provide remedies of a punitive nature.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S.C.C.A.N. 528, 535.

The concurrence worries that we are holding that "large awards (which we may think are excessive) are taxable (*e.g.*, *Hawkins*), but small awards (which we may think are more reasonable) are not taxable (*e.g.*, this case)." Whatever the emotional appeal of such a rule, we agree with the concurrence that it would be utterly unworkable and we would not suggest it. Our test is not "how big is the award," but "does it have a compensatory purpose?" Liquidated damages are traditionally compensatory; punitive damages are not. Thus, ADEA liquidated damages are nontaxable; punitive damage awards such as those discussed in *Hawkins* are. *Accord, Miller*, 914 F.2d at 591.

Because ADEA liquidated damages serve both to punish the employer and to compensate the taxpayer for intangible losses, and because Congress chose to label them "liquidated" rather than "punitive", ADEA liquidated damages are, from the taxpayer's perspective, damages received on account of personal injury. They are therefore excludable under § 104(a)(2). *Accord, Miller*, 914 F.2d at 591; *Bennett*, 30 Fed. Cl. at 401; *Downey*, 100 T.C. at 634.

AFFIRMED.

TROTT, Circuit Judge, concurring in the judgment:

I agree with the majority's conclusion that all damages received in settlement of an ADEA claim are excludable from gross income under § 104(a)(2) of the Internal Revenue Code. As I explained in my dissent in *Hawkins v. United States*, No. 93-15828, slip op. 7949, 7965 (9th Cir. July 19, 1994), I respectfully disagree with the majority's adoption of a two-part test for analyzing whether damages are excludable under § 104(a)(2). Like the Tax Court, I believe the focus should be on whether the ADEA redresses a tort-like personal injury claim. *See Downey v. Commissioner*, 100 T.C. 634, 657 (1993). If the answer is yes, *all* damages received on account of that claim are not taxable. Because I agree with the majority that the ADEA creates a tort-like cause of action, both the backpay award and the liquidated damages award in this case should not be taxable.

The majority, however, has to square this result with the test they created in *Hawkins*. In *Hawkins*, the majority held that punitive damages received in a tort cast are taxable because they are "not necessarily awarded 'on account of' personal injury; rather, they are awarded 'on account of' the tortfeasor's egregious conduct." Slip op. at 7956. According to the majority in this case, damages are not received "on account of' personal injury "unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury." Unfortunately, I don't see how the majority can distinguish ADEA liquidated damages from punitive damages. I think this inconsistency merits attention because it demonstrates problems with the majority's approach in both this case and *Hawkins*.

A. ADEA liquidated damages should really be called double damages because the term liquidated damages is a misnomer. *Cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 114 (1985) ("[A] 'willful' violation of the ADEA[] entitl[es] a plaintiff to 'liquidated' *or double damages.*") (emphasis added). The term "liquidated damages" suggests compensation for damages that are too obscure and difficult to prove. *See Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 707 (1945). However, ADEA liquidated damages serve an entirely different purpose.

The ADEA provides that its provisions "shall be enforced in accordance with the powers, remedies, and procedures" of the FLSA. 29 U.S.C. § 626(b). However, Congress modified the ADEA remedial provisions in two important respects. First, the ADEA did not incorporate § 16(a) of the FLSA which criminalizes willful violations. *See id.* §§ 216(b) & 626 (b). Second, liquidated damages are automatically awarded under the FLSA, *see id.* § 216(b);[1] by contrast, under the ADEA, liquidated damages are only awarded if the violation is willful, *see id.* § 626(b). Because ADEA liquidated damages replaced the criminal provisions of the FLSA, the *Thurston* Court concluded, "The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." 469 U.S. at 125. Based on *Thurston*, I think it's clear that ADEA liquidated damages are akin to punitive damages.

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[1] The court has discretion to award no liquidated damages or reduced liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" FLSA. 29 U.S.C. § 260.

Treating ADEA liquidated damages like punitive damages has also been the law of this Circuit since *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981). The *Kelly* court stated: "[The] award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." *Id.* at 979. In *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985), the court upheld an award of both prejudgment interest and liquidated damages under the ADEA because "liquidated damages and prejudgment interest serve different functions in making ADEA plaintiffs whole." Relying on *Kelly*, the *Criswell* court reasoned that liquidated damages are "a substitution for punitive damages" because they are "intended to deter international violations of the ADEA." *Id.* (internal quotations omitted). By contrast, prejudgment interest is intended to compensate for the loss of use of the money. *Id.* at 556-57.[2] I don't see how the majority can run away from the clear language in *Thurston*, *Kelly*, and *Criswell* indicating that liquidated damages should be treated like punitive damages.

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[2] The Ninth Circuit was the only circuit to adopt this interpretation of ADEA liquidated damages prior to the Supreme Court's decision in *Thurston*. *See, e.g., Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n.6 (1st Cir. 1990); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 n.7 (11th Cir. 1987). However, after the *Thurston* Court held that "Congress intended for [ADEA] liquidated damages to be punitive in nature," *see* 469 U.S. at 125, two circuits reversed their original positions and embraced the *Criswell* approach. *See Reichman v. Borsignore, Brignati & Mazzota, P.C.*, 818 F.2d 278, 281-82 (2d Cir. 1987); *Lindsey*, 810 F.2d at 1102.

B. Because the majority held in *Hawkins* that punitive damages are taxable, a logical application of that rule suggests that ADEA liquidated damages are also taxable. ADEA liquidated damages, like punitive damages, are only awarded in cases of willful violation. ADEA liquidated damages, like punitive damages, are intended to punish and deter.

The majority tries to distinguish ADEA liquidated damages by claiming they "have *both* a compensatory and a punitive purpose." What compensatory purpose? Under the law of this circuit, ADEA liquidated damages do not compensate for the loss of the use of the money, emotional distress, or pain and suffering. *See Criswell*, 709 F.2d at 556-57; *Canceillier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Naton v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981). Realistically, what's left to compensate? The majority's suggestion that Congress may have decided that only parties suffering willful discrimination should recover for intangible or incalculable injuries is peculiar. After all, victims of nonwillful violations would suffer the same intangible or incalculable harm. To me, the willfulness requirement clearly suggests a punitive purpose.

In support of its claim that ADEA liquidated damages serve a compensatory purpose, the majority relies heavily on the Conference Report for the 1978 amendments to the ADEA. The Conference Report states that liquidated damages "compensate the aggrieved party for nonpecuniary losses" and that the amended ADEA "does not provide remedies of a punitive nature." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S.C.C.A.N. 528, 535. However, the 1978 amendments only provided

for a jury trial on the issue of liquidated damages; it did not alter the nature or definition of liquidated damages. The Conference Report's comments in 1978 —11 years after the passage of the ADEA—are interesting, but shouldn't be given much weight. It's ironic that the majority relies so heavily on subsequent legislative history. In *Hawkins*, the majority rejected a similar argument because " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Hawkins*, slip op. at 7959 (quoting *United States v. Price*, 361 U.S. 304, 313 (1961)). Here, the subsequent legislative history is even less relevant because Congress did not in any way alter the definition or availability of liquidated damages.

More troubling, however, is the majority's statement that "for purposes of § 104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer." In other words, even if the case law says ADEA liquidated damages are intended to punish the tortfeasor, "from the recipient's perspective," the liquidated damages may still represent compensation for hard-to-calculate losses. I'm not sure I understand the majority's argument. If ADEA liquidated damages are designed to punish the tortfeasor, it shouldn't matter whether the award is viewed from "the recipient's perspective." The recipient's thoughs or beliefs are irrelevant. The question should simply be: Why are the ADEA liquidated damages awarded? Based on the case law, I think it's clear that ADEA liquidated damages are awarded to punish the tortfeasor, not compensate the victim.

The majority also believes it's significant that "ADEA liquidated damages . . . bear a relation to the

underlying personal injury" because liquidated damages "must equal the plaintiff's total pecuniary loss." But simply doubling the backpay award to compensate for intangible or incalculable injuries seems a rather arbitrary way to compensate victims of discrimination. If the ADEA provided that liquidated damages would be equal to 1000 times the backpay award, the liquidated damages would also "bear a relation to the underlying personal injury" and would increase if the backpay award increased. Under those circumstances, I imagine the majority would say the liquidated damages were clearly punitive. But what's the principle distinguishing the two awards? I'm worried the majority's test may break down into the following rule: large awards (which we may think are excessive) are taxable (*e.g.*, *Hawkins*), but small awards (which we may think are more reasonable) are not taxable (*e.g.*, this case). As I indicated in *Hawkins*, I fear this new test may sow more confusion than clarification.

C. If I am correct, the majority should treat ADEA liquidated damages like punitive damages. Based on *Hawkins*, ADEA liquidated damages should be taxable. Of course, I don't think that's the "right" result, but I think that's the result *Hawkins* requires. The majority's application of the *Hawkins* test to this case only reinforces my belief that *Hawkins*, despite the majority's best intentions, was wrongly decided.

APPENDIX E

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

Docket No. 4844-90

[ADEA]

JOHN A. and MARY B. SCHMITZ, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER

On January 11, 1993, petitioners' Motion for Summary Judgment was filed and, on February 8, 1993, Respondent's Cross Motion for Summary Judgment was filed. The parties agree that there is no dispute as to material facts and the issues may be decided as a matter of law. Respondent's motion is based on the claim that the opinion of the Supreme Court in *United States v. Burke*, 504 U.S. —— (1992), justifies reconsideration of this Court's position in *Downey v. Commissioner*, 97 T.C. 150 (1991). In *Downey v. Commissioner*, 100 T.C. 40 (filed June 29, 1993), the Court reaffirmed the result in *Downey v. Commissioner*, 97 T.C. 150 (1991). Upon due consideration and for cause, it is hereby

ORDERED: That petitioners' Motion for Summary Judgment is granted. It is further

ORDERED: That Respondent's Cross Motion for Summary Judgment is denied. It is further

ORDERED: That, on or before July 30, 1993, respondent shall serve on petitioners and submit to the Court any objection to the proposed decision attached to petitioners' Motion for Summary Judgment, and respondent shall attach to any such objection respondent's proposed decision.

(Signed) Mary Ann Cohen
MARY ANN COHEN
Judge

Dated: Washington, D. C.
June 30, 1993

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-16272

D.C. No. CV-92-00518-DFL

MICHAEL L. RICE and BILLIE M. RICE,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted April 11, 1994**
San Francisco, California

[Filed Sep. 7, 1994]

MEMORANDUM*

Before: GOODWIN, FERGUSON, and TROTT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

For the reasons expressed in our opinion in *Schmitz v. Commissioner*, No. 93-70960, the judgment of the district court is AFFIRMED.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-92-518 DFL/JFM

MICHAEL L. RICE and BILLIE M. RICE,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Mar. 15, 1993]

MEMORANDUM OPINION AND ORDER

Plaintiffs Michael and Billie Rice sue the federal government for a refund of $114,791 in income taxes paid in 1988 and 1989. The parties have cross-moved for summary judgment. The case presents the question of whether a damage award on a claim under the Age Discrimination in Employment Act ("ADEA") is taxable income.

I

Michael Rice sued his former employer, Stauffer Chemical Company, and two Stauffer supervisors for terminating his employment. Rice asserted claims under the ADEA, the California Fair Employment and Housing Act ("FEHA"), and the state law implied covenant of good faith and fair dealing. Before the trial, the court eliminated Rice's prayer for punitive damages. In 1985, the case was tried, and the jury returned a verdict for Rice, finding that Stauf-

fer and the two individual defendants willfully discriminated against him because of his age. The jury awarded Rice $101,395.80 in general damages, $100,000.00 in ADEA liquidated damages, and $25,000.00 for pain and suffering under the FEHA.

The court allowed setoffs of $6,664.00 each (for severance pay Rice had received) against the general and liquidated damage awards, so that judgment was entered for Rice in the amount of $213,067.80 plus postjudgment interest. The court also awarded Rice $6,317.50 in costs and $87,290.18 in attorney's fees. In May 1988, Rice received $359,399.79 in satisfaction of the judgment, costs and fee award. Of this amount, $54,724.00 was postjudgment interest.

On appeal, the Ninth Circuit affirmed the jury verdict and the fee award, but reversed the district court's decision to strike the punitive damage prayer and remanded for a determination of the amount of punitive damages. In November 1989, the parties settled Rice's punitive damage claim for $425,000.00, of which $236,195.11 was paid to Rice, with the remainder paid directly to his attorneys.

In their 1988 federal income tax return, Michael and Billie Rice reported the following as income:

General Damages	$101,396.00
Offset for Severance Pay	(6,664.00)
Court Costs	6,318.00
Attorneys' Fees	87,290.00
Postjudgment Interest	52,724.00
Total	$241,064.00

The Rices also took a $100,403.00 itemized deduction as follows:

Attorney's Fees	$ 94,044.00
Attorney's Costs	5,953.00
Other Legal Costs	406.00
Total	$100,403.00

The Rices did not report as income the pain and suffering and liquidated damage awards.

Plaintiffs' 1988 return showed $50,680.00 in tax liability. The Rices timely paid this amount. In January 1992, plaintiffs claimed a refund of the entire amount. In March 1992, the Internal Revenue Service ("IRS") disallowed the refund claim.

Plaintiffs' 1989 return reported $236,195.00 in income attributable to the settlement of the punitive damage claim. The 1989 return showed $64,429 in tax liability. Again, the Rices timely paid the entire amount, and then claimed a refund. The refund claim was disallowed in March 1992.

Plaintiffs filed this action on April 1, 1992. They seek judicial review of the IRS disallowances of their refund claims. The Rices contend that the amounts in dispute were excludable from income under 26 U.S.C. § 104(a). That provision excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." An IRS regulation provides that for purposes of § 104(a), "damages received" means "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. § 1.104-1(c). Here, the dispute focuses on the tax treatment of three separate "damage" amounts: the ADEA

damage awards (general and liquidated); postjudgment interest; and the punitive damage settlement.

II

Three circuits, including the Ninth, have held that ADEA damages are excludable from income under § 104(a). *See Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991); *Pistillo v. C.I.R.*, 912 F.2d 145 (6th Cir. 1990); *Rickel v. C.I.R.*, 900 F.2d 655 (3rd Cir. 1990). This would seem to resolve the issue. But according to the government, the Supreme Court's recent decision in *U.S. v. Burke*, —— U.S. ——, 112 S. Ct. 1867 (1992), changes the analysis and compels a different result here.

Rickel, the first of the three circuit decisions, held that the § 104(a) inquiry must look to the nature of the claim rather than the consequences of the injury. *Rickel*, 900 F.2d at 661. Because an employer's duty not to discriminate on the basis of age arises by statute regardless of the employment contract, an age discrimination claim is "the assertion of a personal injury, tort type right." *Id.* at 662. In *Pistillo*, the Sixth Circuit relied heavily on *Rickel*, and concluded that while the lost wages sought by plaintiff were "a substantial nonpersonal consequence of his employer's age discrimination," this "did not transform the discrimination into a nonpersonal injury." *Pistillo*, 912 F.2d at 150. Finally, in *Redfield*, the Ninth Circuit followed *Rickel* and *Pistillo*, holding that "age discrimination damages are tort-type recoveries for personal injuries" and are therefore excludable from gross income. *Redfield*, 940 F.2d at 546-47.[1]

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[1] The *Redfield* court also rejected several attempts by the defendant to distinguish *Rickel* and *Pistillo*. First, *Redfield*

Last year, in *Burke*, the Supreme Court was asked to decide whether a Title VII backpay claim settlement was excludable from income under § 104(a)(2). The *Burke* Court first noted that the analysis must focus "on the nature of the claim underlying [the]damages award;" thus, the claimants "must show that Title VII, the legal basis for their recovery of backpay, redresses a tort-like personal injury." *Burke*, 112 S. Ct. at 1872. While the employment discrimination proscribed by Title VII "causes harm to individuals," this "does not automatically imply . . . that there exists a tort-like 'personal injury' for purposes of federal income tax law." *Id.* at 1872-73.

Before the enactment of the Civil Rights Act of 1991,[2] Title VII limited available remedies to backpay, injunctions and other suitable relief. These remedies restore discrimination victims "to the wage and employment positions they would have occupied absent the lawful discrimination." *Id.* at 1873. Furthermore,

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involved a damage award rather than a settlement payment, but the "teaching of *Rickel* and *Pistillo* [is] equally applicable to damage awards as to settlement payments in age discrimination suits." *Id.* at 547. Second, in addition to the ADEA claim, the *Redfield* plaintiff had asserted state FEHA, wrongful discharge and breach of implied covenant claims. But the entire damage award was apparently attributable to the ADEA violation, and even if it were not, there was "no indication in the record that these same damages would not have been available as ADEA personal injury damages." *Id.* at 547. Finally, plaintiff had prayed for tort damages on the state law claims, so any portion of the award allocable to these causes of action would be treated as a tort recovery. *Id.* at 547-48.

[2] Pub. L. 102-166, 105 Stat. 1071 (1991). In *Burke*, the parties agreed that the Act did not apply.

> [n]othing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (*e.g.*, a ruined credit rating).

Id. If "the relevant cause of action evidenced a tort-like conception of injury," discrimination could constitute a "personal injury" within the meaning of § 104(a). For instance, 42 U.S.C. § 1981 and Title VIII of the Civil Rights Act authorize compensatory and punitive damage awards and jury trials and therefore "sound basically in tort." *Id.* at 1873-74. Title VII, by contrast, offers only "wages properly due" rather than the broad remedies available in these other antidiscrimination statutes. Thus, Title VII does not redress a tort-like personal injury within the meaning of § 104(a). *Id.* at 1874.

Justices O'Connor and Thomas dissented in *Burke*, and criticized the majority's focus on available *remedies* rather than "the nature of the statute and the type of claim brought under it." 112 S. Ct. at 1879 (O'Connor, J., dissenting). But Justice Blackmun, writing for the majority, responded that

> the concept of a 'tort' is inextricably bound up with remedies—specifically damages actions. Thus, we believe that consideration of the remedies available under Title VII is critical in determining 'the nature of the statute' and the 'type of claim' brought.

Burke, 112 S. Ct. at 1872 n.7.

Burke does not overrule *Rickel*, *Pistillo* and *Redfield*. But *Burke* does hold that an analysis of the

available remedies is critical to the § 104(a) determination. Like Title VII, the ADEA does not authorize compensatory and punitive damage awards by name. *See Naton v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982). But the ADEA is not identical to Title VII. The ADEA provides for liquidated damages, in an amount equal to wages and benefits from the date of termination to the date of trial, in "cases of willful violations." 29 U.S.C. § 626(b); *see Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987). The Act thus authorizes double damages. It also provides for jury trials. These are significant distinctions from Title VII.

The purpose served by ADEA liquidated damages is the subject of spirited debate. But no court has adopted the government's proposal in this case that liquidated damages are a contract-like remedy for economic harm. *See* Defendant's Mem., 9:5-19 & n.1. Instead, courts have characterized ADEA liquidated damages as compensatory, punitive or both. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990) (liquidated damages serve compensatory and punitive functions); *Fortino v. Quasar Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991) (same); *Burns v. Texas City Refining, Inc.*, 890 F.2d 747 (5th Cir. 1989) (same); *but see Reichman v. Bonsignore, Brignati & Mazzota, P.C.*, 818 F.2d 278, 281-82 (2nd Cir. 1987) (punitive only); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987).

The court adopts the view expressed in *Powers* and elsewhere that ADEA liquidated damages serve

both punitive and compensatory purposes.[3] *Powers*, 915 F.2d at 41-42; *Downey v. C.I.R.*, 97 T.C. 150, —— (1991); *Keller v. C.I.R.*, 1991 WL 148901 (Tax Court 1991). *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 624 (1985) does not compel a different result. The *Thurston* Court observed that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." *Id.*, 469 U.S. at 125, 105 S. Ct. at 624. But *Thurston* did not hold that the *sole* function of liquidated damages was punitive. And while the Court relied on Senator Javits' floor statement during the 1967 debate over the initial Act, the legislative history surrounding the 1978 Amendments shows that Congress intended liquidated damages to "compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA." The legislative history also explains that "liquidated damages are in the nature of legal relief . . . [t]he ADEA as amended by this Act does not provide remedies of a punitive nature." H.R. Conf. Rep. No. 950, 95th Cong., 2nd Sess. 13 (1978).[4] Finally, the regula-

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[3] The partly punitive *function* of liquidated damages does not render these damages "punitive" and therefore taxable income under the court's ruling on punitive damages. *See infra* at 9-11.

[4] The Ninth Circuit has stated on several occasions that liquidated damages are a substitute for punitive damages. *See, e.g., Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556 (9th Cir. 1983); *Cancellier*, 672 F.2d at 1317 n.4; *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981). But these cases ultimately rely on a Fifth Circuit decision that predates the 1978 Amendments and their attendant legislative history. *See Kelly*, 640 F.2d 974, 979 (9th Cir. 1981) (citing *Dean v. American Security Insurance Co.*, 559 F.2d

tion's reference to "tort type rights" invites a liberal reading by its deliberately vague and inclusive language. 26 C.F.R. § 1.104-1(c).

The court conclude that *Redfield* is still the law of this circuit. In light of the ADEA's provision of compensatory and punitive damages through a liquidated damage award and its provision for jury trial, the Act "sounds basically in tort." *Burke*, 112 S. Ct. at 1874. Plaintiff Michael Rice's ADEA damage awards are therefore excludable from income under § 104(a). The court enters summary judgment in plaintiffs' favor on this issue.

III

The parties also dispute the tax consequences of $52,724.00 in postjudgment interest that Michael Rice received in 1988. Interest is specifically included in "gross income" under 26 U.S.C. § 61(a)(4), and "interest awarded in a judgment is generally considered ordinary income, regardless of how the judgment itself is taxed." *Aames v. C.I.R.*, 94 T.C. 189, 190 (1990) (citing *Wheeler v. C.I.R.*, 58 T.C. 459, 461-62 (1972)). Thus, statutory interest (prejudgment *or* postjudgment) on tort damages is *not* excludable under § 104(a)(2) even though the damages themselves are excluded from income. *Kovacs v. C.I.R.*, 1993 WL 46512 (Tax Court Feb. 24, 1993). Defendant is entitled to summary judgment on this issue.[5]

1036, 1039-40 (5th Cir. 1977)); *Cancellier*, 672 F.2d at 1317 n.4 (same).

[5] *Roemer v. C.I.R.*, 716 F.2d 693 (9th Cir. 1983), cited by plaintiffs for the general proposition that "damages flowing

IV

The court is finally asked to decide whether the $236,195.00 punitive damage settlement is excludable under § 104(a)(2). The history of the treatment of punitive damages under the Tax Code is somewhat tortured. Initially, punitive damages were taxed as ordinary income. But in 1975, the IRS issued a Revenue Ruling which interpreted § 104(a)(2) to *exclude* punitive damages received on account of a *personal injury*. Rev. Rul. 75-45, 1975-1 C.B. 47; *see Roemer v. C.I.R.*, 716 F.2d 693, 700 (9th Cir. 1983). In 1983, the Ninth Circuit held that in light of the Commissioner's "liberal" interpretation of the statute in the Revenue Ruling, punitive damages awarded on a defamation claim were excluded from gross income. *Roemer*, 716 F.2d at 700.

Then, in 1984, the IRS reversed field and revoked Rev. Rul. 75-45, because punitive damages do not compensate a taxpayer for loss and "are awarded not 'on account of personal injury' . . . but are determined with reference to the defendant's degree of fault." Rev. Rul. 84-108, 1984-2 C.B. 32. In *C.I.R. v. Miller*, 914 F.2d 586, 591 (4th Cir. 1990), the Fourth Circuit recognized the effect of the Commissioner's shift:

> [In *Roemer*], the Ninth Circuit was merely presenting proof that when in Rome one should do as the Romans do. However, in the first place, the Commissioner's subsequent shift in position calls for *Roemer*, as a Roman, to shift also.

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from personal injury are excludable," does not purport to alter the longstanding rule that interest is income.

Id. at 591. In light of the 1984 Revenue Ruling and the general principle that exclusions from income are narrowly construed, the *Miller* court held that punitive damages should be included in gross income. *Id.*

Finally, in 1989, Congress amended § 104(a) to provide that the exclusion for personal injury damages "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." The parties agree that the 1989 amendment has no bearing on this case,[6] although plaintiffs argue that the IRS sought the 1989 amendment because "for previous and transition years, those punitive damages were in fact excludable."

Plaintiffs urge the court to follow *Roemer*. But *Roemer* relied solely (and perhaps reluctantly) on the 1975 Revenue Ruling that was subsequently revoked. Before that Ruling, it was well-settled that punitive damages were taxable income because they represented an accession to wealth rather than restoration of capital. *See, e.g., Starrels v. C.I.R.*, 304 F.2d 574, 576-77 (9th Cir. 1962). Because the Ruling has been revoked, punitive damages are again taxable income.[7]

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[6] Congress expressly provided that the amendment would not apply to any suit filed before July 10, 1989. *See* Pub. L. 101-239, § 7641(b) (1989).

[7] The parties do not discuss the degree of deference due the 1984 Revenue Ruling. "Revenue Rulings, while not binding on the Secretary or on the Courts, will be given considerable weight when explicating the Commissioner's authority to implement a congressional mandate." *Certified Stainless Services, Inc. v. United States*, 734 F.2d 1383, 1386 (9th Cir. 1984) (citations omitted). But 26 U.S.C. § 104(a), the statutory provision in question, does not grant the Secretary discretionary power to determine "damages received on ac-

V

Plaintiffs' motion for summary judgment is granted as to the tax treatment of ADEA damages. Defendant's motion for summary judgment is granted as to the tax treatment of postjudgment interest and punitive damages. The clerk is directed to defer entry of judgment; the parties shall submit a proposed judgment within sixty (60) days of the date of this order.

IT IS SO ORDERED

/s/ David F. Levi
DAVID F. LEVI
Judge
United States District Court

Dated: 2 March 1993

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count of personal injuries." *Cf. Certified Stainless Services*, 734 F.2d at 1386. Even if the 1984 Ruling is given no deference, though, *Starrels* once again appears to be the law of the circuit.

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No. 94-944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
JOHN A. AND MARY B. SCHMITZ, RESPONDENTS.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
HOWARD H. AND MARIANNE KELLER, RESPONDENTS.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,
v.
MICHAEL L. AND BILLIE M. RICE, RESPONDENTS.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS F. JOYCE*
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

* *Counsel of Record for John and Mary Schmitz and Howard and Marianne Keller*

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether age discrimination in violation of the duty imposed by the Age Discrimination in Employment Act of 1967 is a tort-like personal injury, entitling victims to exclude settlement amounts from their gross income as "damages received . . . on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code.

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This Brief in Opposition is submitted on behalf of respondents John and Mary Schmitz and Howard and Marianne Keller, who are represented by the same counsel as the taxpayers in *Commissioner* v. *Schleier*, cert. granted, No. 94-500.

The lawsuit against United Air Lines, Inc., whose tax treatment is at issue in this case was a class action under the Age Discrimination in Employment Act of 1967 (the "ADEA") that is already before the Court as a result of the grant of certiorari in *Commissioner* v. *Schleier*. The group of plaintiffs involved in this ADEA class action has been referred to as the "Schleier Group" in case No. 94-500.

COUNTER-STATEMENT OF THE CASE

In accordance with Rule 24.2, respondents Mr. and Mrs. Schmitz and Mr. and Mrs. Keller limit their statement to the following clarifications:

1. Petitioner refers to *Downey* v. *Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for reh'g denied* (Nov. 18, 1994), as a "case arising out of the United Airlines [sic] settlement agreement." Pet. at 5. This inaccurately implies that the taxpayer in *Downey* had been a member of the Schleier Group. However, Mr. Downey did not file a complaint alleging age discrimination against the airline until approximately five years after the class action commenced by members of the Schleier Group. *See* 97 T.C. at 154. The taxpayer in *Downey* did not participate directly in the settlement of the ADEA class action referred to in the Preliminary Statement involving United Air Lines, Inc. His lawsuit was settled before and separately from the disposition of the class action. *Id.* at 155. The taxpayers in *Downey* are

represented by different counsel from the attorneys in *Schmitz*, *Keller*, and *Schleier*.

2. Although the Tax Court issued its original opinion in *Keller* v. *Commissioner*, Pet. App. at 3a, following its decision in *Downey*, it subsequently separated the rationales for the holdings of the two cases by entering a decision on behalf of Mr. and Mrs. Keller on the basis of *Redfield* v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991), under the rule of *Golsen* v. *Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), shortly after the decision of this Court in *United States* v. *Burke*, 112 S.Ct. 1867 (1992). *See* Pet. App. at 12a - 13a.

3. The lawsuit against Stauffer Chemical Company that Mr. Rice prosecuted is unrelated to the Schleier Group's proceedings involving United Air Lines, Inc. Mr. and Mrs. Rice are represented by separate counsel, Mr. Edward Diener, who has been provided with a copy of this brief as well as the Brief in Opposition in *Commissioner* v. *Schleier*.

REASONS FOR DENYING THE WRIT

The cases of Mr. and Mrs. Schmitz and Mr. and Mrs. Keller present the same legal issue as *Commissioner* v. *Schleier*, cert. granted, No. 94-500. Without waiving any of the arguments presented by the Brief in Opposition in case No. 94-500, which apply with equal force in their cases, Mr. and Mrs. Schmitz and Mr. and Mrs. Keller inform the Court that they are unaware of any principled basis for granting certiorari in *Commissioner* v. *Schleier* and denying it in their cases.

CONCLUSION

Mr. and Mrs. Keller agree that the petition in their case should be held and disposed of as appropriate in light of the Court's disposition of *Commissioner* v. *Schleier*, No. 94-500. Mr. and Mrs. Schmitz are sympathetic to the petitioner's request for similar treatment of their case, and have no interest in a consolidation of their case with *Schleier*, if proceedings in the latter would be delayed or complicated thereby or if no other cases are consolidated with *Schleier*. Mr. and Mrs. Schmitz therefore agree with the petitioner's suggestion that their case also be held, unless the Court believes its consideration of *Commissioner* v. *Schleier* would be assisted by joining a related proceeding in the least disruptive manner possible, in which case they are agreeable to having their case consolidated with *Commissioner* v. *Schleier*.

Respectfully submitted,

THOMAS F. JOYCE*
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

* *Counsel of Record for John and Mary Schmitz and Howard and Marianne Keller*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

DOUGLAS B. ALLEN
G. EDWARD DIENER
BURNETT, BURNETT & ALLEN
333 W. Santa Clara St.
Suite 1000
San Jose, CA 95113
(408) 298-6540

Attorneys for Respondents Michael L. and Billie M. Rice

QUESTION PRESENTED

Whether back pay and liquidated damages received in settlement of litigation under the Age Discrimination in Employment Act are excluded from gross income under Section 104 (a) (2) of the Internal Revenue Code as "damages received . . . on account of personal injuries or sickness" (26 U.S.C. 104 (a) (2)).

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This Brief in Opposition is submitted on behalf of respondents Michael L. and Billie M. Rice. The Schmitzs and the Kellers are represented by the same counsel as the taxpayers in *Commissioner v. Schleier*, No. 94-500.

Petitioner has in its Petition for a Writ of Certiorari erroneously named the Commissioner of Internal Revenue as a party in the Rice case. Because the Rices paid their taxes in question and sought a refund, the correct party, as reflected in the courts below, is the United States of America.

CONCLUSION

Mr. and Mrs. Rice agree with the counter-statement of the case presented by the Schmitzs and Kellers. Further, the Rices agree that, without waiving any of the arguments presented or to be presented by the taxpayers in No. 94-500, *Schleier*, they are unaware of any basis for granting certiorari in that case and denying it in their case.

The Rices agree that the petition in their case should be held and disposed of as appropriate in light of the Court's disposition of *Schleier*.

Respectfully submitted,

DOUGLAS B. ALLEN
G. EDWARD DIENER
BURNETT, BURNETT & ALLEN
333 W. Santa Clara St.
Suite 1000
San Jose, CA 95113
(408) 298-6540

Attorneys for Respondents
Michael L. and Billie M. Rice